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SUPREME COURT, U.S.

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No. 344

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA, *Petitioner*

VS.

WARREN V. MOORE AND MRS. WARREN V. MOORE,
Respondents

RESPONDENTS' MOTION FOR RE-HEARING

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Come now Warren V. Moore and Mrs. Warren V. Moore, respondents in the above entitled and numbered matter, and move the Court to grant them a re-hearing for the following reasons:

1.

The Court in the majority opinion erred in holding that there survived to the petitioner, upon de-control of the City of Dallas, the right under Section 206(b), to enforce the compliance with the Act solely by an order of restitution.

The majority opinion in extending the Warner case to embrace restitution as an action within itself, is contrary to all of the concepts of the law of restitution as evolved throughout legal history. Restitution of and in itself has never been a cause of action, either in equity or at law. It is now, or was until the holding in this case, and always has been incidental in granting relief in equity or in an action at law. It is now and always has been wholly and purely ancillary. It may be, as held by the majority, that the order for restitution entered by the District Court in this action, was permissible under Section 206(b) as "*another order*" ancillary to or adjunctive to the legal action for penalties as provided in Section 205.

To construe Section 206 and enlarge the holding in the Warner case other than as above stated, is stretching even the broad ground of interpretation adopted in the Warner case beyond the realm of interpretation and into the realm of Legislation and the overturning of the great body of the substantive law and of all the concepts of restitution as decided, applied and restated down through the ages to and including the Restatement of the Law of Restitution. Surely the majority did not intend such clear implication to arise out of its holding in this case.

It matters little to the respondents whether the final judgment against them carried the adjunctive relief of restitution, so long as it is adjunctive to or incidental to the only relief which is available to the petitioner in the legal remedy provided in Section 205. If any right sur-

vived at all this Court should go no further than holding that restitution is available as "another order" for the purpose of enforcing the legal action and penalties as provided in Section 205 in the action at law which arises under such section.

2.

The Court in its majority opinion erred in holding that any cause of action survived de-control of the City of Dallas under the provisions of Section 204(j)(3) and wholly overlooks, ignores and fails to give application to the fact that the "sufficient answer" given by this Court as Section 204(f), as set out in the margin, was a part of Title II and terminated and ceased to be effective with de-control. If Title II of the Act was terminated as impliedly held by the majority in its opinion by de-control under Section 204(j)(3), by the same token Section 204(f) ceased to be operative and of no avail to sustain petitioner's action.

The majority in its opinion also clearly failed to give effect, even if we must assume that Section 204(f) was available, that it saved to the petitioner only an action with respect to any right or liability which had theretofore accrued under the Act. There accrued no right to enforce the provisions of the expired act. The rights, if any, that were saved by Section 204(j) were the rights to enforce the penalties of Section 205, and the only liability, if any, surviving against the respondent would be to

respond with the penalty as provided in Section 205. Expired acts are not enforced beyond the penalty imposed for the infraction thereof.

In connection with the holding of the Court of Appeals, certainly respondents did not challenge and are not challenging the decision of that Court on petitioner's cross-appeal as pointed out in footnote five of this Court's opinion. The respondents here concede, as they did in the Court of Appeals, that the liabilities under Section 205 were as held by the Court of Appeals for that period, if any, embraced in a proper complaint which occurred during the period in which Section 205, as amended, was effective. We still concede that that is the law without conceding that there was any period of time available to the petitioner during the effective period of Section 205 as amended. We do not concede that Section 205, as amended, had a retroactive or retrospective effect, and that for any period of time prior to the amendment, it is still discretionary with the Trial Court to award damages or $50.00.

3.

The Court erred in holding that the respondents waived a right to a trial by jury for the reason that that to which one has no right can not be waived. This action as filed and as tried was based upon a complaint wholly equitable and certainly the law and the Federal Rules of Civil Procedure do not require one to do the ridiculous, absurd and foolish, and that is what a demand for a jury would have

been in this action in the state of the pleadings. Respondents submit that Federal Rule of Civil Procedure No. 38 should be construed under the Rule of Reason, rather than as interpreted by the Court in this case. To hold that Rule 38 is inflexible and requires one at his own peril to either do the absurd and ridiculous by demanding a jury to which he is clearly not entitled or to waive the same, brings such Rule clearly in conflict with the Seventh Amendment to the Constitution, and any other Rule which this Court might make which abridges the rights of a party under the Constitution, *upon a timely assertion of such right after it has become available*, must yield to the Constitution.

The respondents in this case timely filed their motion to dismiss the equitable action, which motion we submit was erroneously overruled by the Trial Court and applying the Rule of Reason to Rule 38, respondents would have had ten days in which to demand a jury after the pleadings, (either by amendment by the parties or by an Appellate Court as was done in this case) made it apparent that the right to a trial by a jury was available.

Counsel for respondents here and now certifies that within the time provided by Rule 38, Rules of Civil Procedure, after the return of the mandate from the Court of Appeals in this case to the Trial Court, did timely file and serve respondents written demand for a jury, which has been denied. If necessary, respondents ask that certiorari to the Trial Court issue to bring a supplemental

record forward showing such action. There are many fact questions in this case as to the legal action which survived, if anything survived, on which respondents are entitled to a jury, and of which they have been deprived. Respondents had the right to and did stand in this case on their pleadings which would have had the effect of reforming the action to an action at law and have never had their day in Court, which should be granted and before a jury, as guaranteed by the Constitution.

WHEREFORE, respondents pray that a re-hearing be granted; that the judgment of the Court of Appeals be reversed and the complaint ordered dismissed; or in the alternative the judgment of the Court of Appeals be affirmed with further instructions that the new trial as ordered be in an action at law with a jury.

Respectfully submitted,

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The foregoing petition for re-hearing is presented in good faith and not for delay.

FRANK CUSACK